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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 256.

COMMERCIAL CREDIT COMPANY,
(A CORPORATION),
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

DUANE R. DILLE,
Counsel for Petitioner,
100 E. 42nd Street,
New York, N. Y.

WILLIAM S. GWYNN,
Baltimore, Md.
Of Counsel.

King Bros., Inc., Printers, 409 E. Saratoga Street, Baltimore, Md.

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REPLY BRIEF FOR PETITIONER.

Statement.

In the petition for writ of certiorari we said that the question pressing for decision was that referred to by Mr. Justice Butler in his concurring opinion in *Port Gardner Investment Company vs. United States,* 272 U. S. 564, as to whether or not when an officer discovers a person transporting intoxicating liquor he may disregard the plain and direct commands of Section 26 of the National Prohibition Act to proceed against the vehicle as there directed. In other words, is Section 26 mandatory? That is the important question both the Government and the Petitioner are now desirous of

having answered in order to clear the confusion that exists in the District and Circuit Courts.

Compare:

United States vs. Commercial Credit Co. (C. C. A. 4), 20 Fed. (2d) 519;

Commercial Credit Corp. vs. United States (C. C. A. 2), 18 Fed. (2d) 927;

United States vs. Two Mack Trucks (D. C. E. D. Pa.) 20 Fed. (2d) 188;

The Jugoslavia (D. C. E. D. La.), 21 Fed. (2d) 99.

At the oral argument it was insisted that that is the only question that can now be considered. It is agreeable to us to have it so. The other points were raised in our briefs as a mater of duty so that the Court might be informed of all questions considered by the courts below.

The Record.

The Justices of this Court at the oral argument experienced difficulty with the precise question as disclosed by the record of this case. The Stipulation of Counsel (R. 31) may be subject to the criticism offered that the words "identical transaction" are not precise. It must be remembered, however, that this record was made before the decisions by this Court in *United States vs. One Ford Coupe* and *Port Gardner Investment Company vs. United States.* The records prepared in the *Second and Fourth Circuits* were clear and unambiguous, but, unfortunately, Petitioner won in both those Circuits and could not bring the question here. In the meantime, however, the case at bar was decided by the *Ninth Circuit* and it has thrown the general subject again into confusion.

It is apparent that both the District Court and the Ninth Circuit considered the car was seized while in the act of transporting intoxicating liquor. In the District Court decision (R. 38), Judge Bourquin says "also in October, 1925, the Ford car was seized in Seattle *while engaged in transporting quart bottles filled with liquor,*" (Italics ours) and in the Circuit Court (R. 71), Judge Kerrigan says "this case differs in only one respect from that bearing the same title and numbered, 4915, decided February 14, 1927, 17 *Fed.* (2nd) 483, in that the driver of the seized automobile, although *charged with both illegal possession of* intoxicating liquor *and transportation* thereof was prosecuted only for the offense first named." (Italics ours.)

The record we submit justifies the finding of fact by both the District and Circuit Court and that finding should be binding upon the Supreme Court. The record shows that the libel against the car was filed by C. T. McKinney, Assistant U. S. Attorney, alleging that the car was seized October 9, 1925, by William Whitney, Deputy Collector of Internal Revenue, for violation of Section 3450 R. S. (R. 3-4). The amended answer sets forth that if the automobile offended any law it was the National Prohibition Act and not Section 3450 (R. 18). The testimony of Customs Inspector, Ryan, was that the car had been transporting liquor and was transporting liquor at the time of its seizure. He says (R. 25):

> "I had watched it a couple of times, *before I seized it make deliveries* • • • and I decided to stop and catch him so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the Coupe and *started the motor and started to back out of the alley and I stopped him.*" (Italics ours.)

While the libel states that the seizure was made by W. M. Whitney, the testimony of Whitney does not disclose that the direct seizure was made by him, although it does disclose that he was Deputy Collector of Internal Revenue and Assistant Prohibition Administrator (R. 28). Under the rulings in district and circuit courts, and we also take it by this Court, in *Dodge vs. United States,* 272 U. S. 530, the seizure can be made by "any officer of the law." Presumably, therefore, Whitney was Ryan's superior and for that reason his name appears in the libel. The expression appearing in the Stipulation of Counsel (R. 31) "the identical transactions here involved" appears throughout the record such as the amended answer (R. 18) and is intended to show that the testimony of Ryan (R. 25-26), "so I arrested him and took him down to the immigration station and put the car in the appraiser's warehouse" was the same identical act or series of acts which was the basis for the arrest of the driver for transportation and the libeling of the car for violation of Section 3450.

We trust that this will be sufficient to satisfy the Court that the precise question is now before it for decision.

ARGUMENT.

I.

The Statutes Are Mandatory And In Conflict.

The principal argument in the brief filed for the United States of America is that the word "shall" in Section 26 N. P. A. should be construed as "may" so that the statute might be considered as permissive in-

stead of mandatory. It is true that in some cases the word "shall" has been construed as "may" where the circumstances justified that construction. Such a case is Railroad Company vs. Hecht, 95 U. S. 168, cited by counsel for the government. But it is equally true that in many other cases, such as those statutes providing that instruments "shall" be acknowledged in a prescribed form, the courts have construed "shall" as mandatory. We need not examine those cases because we have a closer illustration of the mandatory effect of the word "shall" in section 3450 itself. It is because of the mandatory feature of that statute that this court has given full effect to the forfeitures provided for therein, although the forfeitures against innocent parties were harsh and unjust. If the word "shall" in that statute could have been construed as "may" it is apparent from the expressions in the opinions of this court that forfeitures of the property of innocent parties would not have been enforced in Dobbins Distillery vs. United States, 96 U. S. 395; Henderson Distilled Spirits, 14 Wall. 44, 81 U. S. 44; Goldsmith-Grant Co. vs. United States, 254 U. S. 505, and the other cases of like effect.

We do and always have insisted that section 3450 is mandatory notwithstanding the statement to the contrary on page 13 of the brief for the United States We also insist that section 26 is mandatory. And when, as in the case now at bar, you have two mandatory statutes giving opposing commands in respect to the same act or transaction, then those statutes are in conflict. Here the liquor in the car may have been "concealed and removed" with intent to defraud of a tax in violation of section 3450, and at the same time "possessed and transported" in violation of the National Prohibition Act. Then you have both section 3450 and

section 26 commanding seizure and forfeiture. But there can be only one forfeiture of the car. So the statutes are in conflict. And being in conflict, section 3450 was not re-enacted by the Willis-Campbell Act because of its express terms. Supplemental Act of 1921, chap. 34, Act Nov. 23, 1921, 42 Stat. L. 222, 223. Therefore, section 3450 is repealed, in so far as the circumstances of this case are concerned, because of the general principles of law in *United States vs. Yuginovich,* 256 U. S. 450.

Commercial Credit Co. vs. United States (C. C. A. 6), 5 Fed. (2) 1;

Lewis vs. United States (C. C. A. 6), 280 Fed. 5;

Commercial Credit Corporation vs. United States (C. C. A. 2), 18 Fed. (2) 927;

United States vs. One Reo Truck (C. C. A. 2), 9 Fed. (2) 529;

United States vs. One Ford Coupe (C. C. A. 5), 4 Fed. (2) 528;

One Ford Touring vs. United States (C. C. A. 8), 284 Fed. 823;

McDowell vs. United States (C. C. A. 9), 286 Fed. 521.

See also—

Reed vs. Thurmond (C. C. A. 4), 269 Fed. 252;

United States vs. One Haynes Auto (C. C. A 5), 274 Fed. 926;

Farley vs. United States (C. C. A. 9), 269 Fed. 721;

Ketchum vs. United States (C. C. A. 8), 270 Fed. 416.

Section 26 by its terms is mandatory. It is not a question, which statute the government, by its District Attorneys or other officers, may elect to enforce. No officers are authorized to make an election where there has been transportation. Section 26 itself makes the election.

II.

Interpreting Section 26 as Mandatory Will Not Affect the Customs Statutes.

In pages 8 to 11 of the brief for the United States great stress is laid upon the embarrassment and consequences that will follow as to the customs acts if section 26 is held to be mandatory. The fears of counsel for the government in that respect are not well founded. The Tariff Act of 1922 was enacted after the National Prohibition Act and after the Willis Campbell Act and superseded any previously enacted prohibition statutes inconsistent therewith.

Charles Zimmerman Sons Co. vs. Ferguson, Collector of Customs (D. C. E. D. Mich.), 16 Fed. (2) 604;
United States vs. Cardwell, 9 Fed. (2) 146.

Furthermore transportation in section 26 refers only to acts within the boundaries of the United States and not to smuggling across the border.

III.

Justice to the Innocent is More Important Than Convenience to the Government.

If this Court should now hold that section 26 is not mandatory we will have the absurd results and injustice resulting as is indicated in *United States vs. Commercial Credit Company* (*C. C. A.* 4), 20 *Fed.* (2) 519, where it was held that under *United States vs. One Ford Coupe* a forfeiture under 3450 could precede a trial against the individual but since the individual had been tried and convicted while the case as to the car

was pending in the Circuit Court, it was useless to order a new trial against the car under section 3450 since it would follow under *Port Gardner Investment Co. vs. United States,* the action would then be barred.

Such a situation warrants the comment of the Circuit Court of Appeals for the Second Circuit in *Commercial Credit Corporation vs. United States,* 18 Fed. (2) 927,

> "It is settled that after the conviction of such persons forfeiture under Section 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction would be most inequitable to innocent owners and lienors and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons. We do not find in the Supreme Court decisions anything which compels us to take this view."

IV.

Subsequent Legislation Refutes Instead of Supports the "Basic Tax" Theory.

On page 24 of the brief for the United States it is said that section 900 of the Revenue Act of 1926—Act of Feb. 26, 1926, c. 27, 44 Stat. 9, 104; U. S. C. App., Title 26, sec. 245, supports the basic tax theory in the majority opinion in *United States vs. One Ford Coupe.* We submit the contrary is true. Subdivision 4 of that statute, amending section 600 (a), now reads as follows:

> "(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are

diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected *a tax of* $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65 or $1.10 per proof or wine gallon has been paid upon such distilled spirits *a credit of the tax so paid* shall be allowed in computing *the tax imposed by this paragraph.*" (Italics ours.)

Section 600 (a) of the Revenue Act of 1918, as amended by the Act of Nov. 23, 1921, considered by Mr. Justice Brandeis, reads as follows:

Revenue Act 1921.

Act Nov. 23, 1921, Chap. 136, Sec. 600; 42 Stat. L. 285.

Sec. 600. That sub-division (a) of Section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following:

"Provided, That on all distilled spirits on which tax is paid at the non-beverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected *an additional tax of* $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion." (Italics ours.)

Mr. Justice Brandeis in the majority opinion in *United States vs. One Ford Coupe* was apparently influenced by the language "an additional tax of $4.20" in section 600 of the Revenue Act of 1921 amending section 600-A of the Revenue Act of 1918, because that opinion says:

> "The acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, *and added to it the additional amounts* in case of illegal distillation or diversion to illegal uses. *These additional amounts also are called taxes* by Congress, and were understood by it to be such. Whether they were intrinsically penalties, and should be treated as such, we need not determine." (Italics ours.)

It is to be noted, therefore, that by the Revenue Act of 1926 Congress again uses language similar to the Revenue Act of 1918, 600 (a), Act of Feb. 24, 1919, and therefore negatives the interpretation that Congress intended a basic tax of $2.20 plus an additional tax of $4.20 for diversion. The Revenue Act of 1926 shows clearly that Congress always intended one tax only of $6.40 and this has been held to be a penalty.

Regal Drug Co. vs. Wardell, 260 U. S. 386.

V.

Interpreting Section 26 as Mandatory Aids and Does Not Retard Prohibition Enforcement.

Congress recognized that in our great social experiment of prohibition it was dangerous to go counter to reason and justice. Accordingly in section 26 it safeguarded the innocent from the deodand theory used by the courts in forfeitures under section 3450 to support the public revenue.

The guilty are punished under the Prohibition Act and in all cases the individuals have been prosecuted under that act. Why, then, should not the car be prosecuted under the same act so as to protect the innocent instead of under section 3450, where the only result is to confiscate property of the innocent. Extending the "deodand" theory—the giving of a personality to a thing—beyond the revenue statutes, and using it in fact, if not in theory, in support of prohibition is filled with great danger.

We believe that this court will give serious consideration to the efforts of Congress under section 26 to protect the innocent.

Respectfully,

DUANE R. DILLS,
Counsel.
New York City.

WILLIAM S. GWYNN,
Baltimore, Md.,
Of Counsel.